Omni Hotels Management Corporation *and* Unite Here Local 1. Case 13–CA–250528

January 20, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

Pursuant to a charge filed on October 24, 2019, and a first amended charge filed on November 21, 2019, by UNITE HERE Local 1 (the Union), the General Counsel issued a complaint and notice of hearing on March 18, 2020. The complaint alleges that the Respondent, Omni Hotels Management Corporation, violated Section 8(a)(5) and (1) of the National Labor Relations Act by eliminating its practice of giving an annual wage increase to food and beverage (F&B) employees in a bargaining unit represented by the Union, without notifying the Union in advance and giving it an opportunity to bargain with the Respondent about this conduct and its effects. On March 27, 2020, the Respondent filed an answer in which it denied the commission of any unfair labor practices.

On June 30, 2020, the Respondent, the Union, and the General Counsel filed a joint motion to waive a hearing by an administrative law judge and to submit this case to the National Labor Relations Board for a decision based on a stipulated record. On August 11, 2020, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel each filed briefs and answering briefs.

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Chicago, Illinois, has been engaged in the business of providing hotel, lodging, and entertainment services at the Omni Chicago Hotel, located at 676 N. Michigan Ave., Chicago, Illinois, 60611. In conducting its operations during the 12-month period ending December 31, 2018, the Respondent derived gross revenues in excess of $500,000 and sold or performed services from the Hotel valued in excess of $5000 to customers located outside the State of Illinois. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts[1]

Following the representation election held on July 10, 2019, the Board certified the Union on July 18 as the exclusive collective-bargaining representative of the F&B employees in the following appropriate unit:

> *Included*: All regular part-time and full-time food and beverage employees, including stewards, cooks, hosts/hostesses, servers, room service servers, food runners, banquet servers, banquet housepersons, bartenders, room service order takers, beverage servers, bussers, cafeteria attendants, steward supervisors, banquet supervisors, and room service supervisors employed by the Employer at 676 N. Michigan Avenue, Chicago, Illinois 60611.
>
> *Excluded*: All other employees, including valet employees; engineering employees; housekeeping employees; front desk department employees; storeroom associates; and managers, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the F&B employees under Section 9(a) of the Act.[2]

The stipulated record reflects that, from 2002 through 2014, the Respondent granted the F&B employees an annual wage increase in September or October of every year except 2009, and in most of those years an additional wage increase in March or April.[3]

[1] We do not pass on the Respondent's argument on brief that its January 21, 2020 email to the Region is inadmissible pursuant to Federal Rule of Civil Procedure 26(b)(3), because we do not rely on that email in finding a violation here. However, we note that in the parties' stipulation, the Respondent acknowledged that it does not object to the admissibility of the attachments to that email.

[2] The stipulated record shows that, for at least a decade prior to 2017, banquet servers and supervisors, who are included in the F&B unit, did not receive wage increases. The General Counsel's brief to the Board not only concedes this point but further contends that "the exclusion of those specific classifications represented a fixed feature of Respondent's practice, such that it was predictable and would have come to be anticipated by those affected employees from year to year." Accordingly, the General Counsel does not allege that the banquet servers or supervisors were entitled to a wage increase in September 2019 and, for the sake of simplicity, our use of the term "F&B employees" hereinafter excludes those two classifications.

[3] Specifically, the Respondent granted the F&B employees a wage increase at the end of September 2002 and 2003. Then, in every year from 2004 through 2013, the F&B employees received a wage increase twice a year on or about April 1 and October 1, except that no wage

From 2015 through 2018, the Respondent granted annual wage increases once a year on September 1 to most hourly employees, including the F&B employees. Specifically, with minor exceptions noted, for the 4 years leading up to the 2019 raises at issue here, the Respondent implemented the following annual wage increases for the F&B employees and for other hourly employees in the housekeeping, front office, guest services, and security departments:

- 2015: Wage increase of 3% for all hourly employees, including F&B employees, except for F&B banquet servers and banquet supervisors, who received no raise, and in-room dining servers, who received an increase of 4.2%, to $10.00 per hour.
- 2016: Wage increase of 4% for all hourly employees, including F&B employees, except for F&B banquet servers and banquet supervisors, who received no raise.
- 2017: Wage increases of 46¢ or 93¢ for all hourly employees, including F&B employees, except bell persons, depending on whether employees were classified as tipped or non-tipped. Bell persons, who are not a part of the bargaining unit in this case, received a $1.00 increase. These increases did not correspond to a set percentage of the employees' wage rates.
- 2018: Wage increase of 3.5% for all hourly employees.

In sum, for 17 consecutive years from 2002 through 2018, with the sole exception of 2009, the F&B employees received a wage increase in either September or on October 1. The parties stipulated that between January 2002 and June 2019 the decision to grant a wage increase to the F&B employees was based on various considerations, including the budgeted, forecasted, and actual economic performance of the hotel, statutory minimum wage requirements, and the wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances.[4]

On August 6, 2019,[5] following the Union's certification as representative of the F&B unit employees, the Respondent and the Union commenced negotiations for an initial collective-bargaining agreement. On August 30, at the parties' second bargaining session, the Union presented its first proposal for a collective-bargaining agreement, to be effective from July 1, 2019, until August 31, 2023. The proposal was not a complete contract and did not contain any proposal regarding wage increases.

In September, the Respondent prepared and delivered performance reviews to both the F&B and non-F&B employees. On September 19, the Respondent implemented annual wage increases for unrepresented non-F&B hourly employees, retroactive to September 1.[6] Without providing the Union advance notice and an opportunity to bargain, the Respondent did not provide an annual wage increase to the F&B employees.

On October 4, the Union presented its first wage proposal to the Respondent via email. The proposal sought to establish minimum wage scales for the F&B unit, effective retroactively to September 1. The Union did not seek a uniform amount or percentage of wage increase. Then, on October 10, the Union raised the Respondent's failure to provide the newly-represented F&B employees with their annual wage increase, in an email to the Respondent stating:

> Employees were told that they would not be receiving their regular yearly raises due to Union negotiations. In the past the raises have been given out at the end of September following employee evaluations. The Hotel gave evaluations but no raise. The non-union departments had their evaluations and received the yearly raise last week.

On October 15, the Respondent replied,

> With regard to the wage issue, as you know the Hotel is required by the National Labor Relations Act to maintain the status quo while negotiating with the Union for a first contract. Based on all the facts and circumstances as I understand them, I believe the Hotel is correct that the status quo with respect to wages is the employees' current wage rate. Accordingly, the Hotel does not believe it has made a unilateral change in wages for the bargaining unit employees and, in fact, believes that

increase was granted around October 1, 2009. In 2014, the Respondent granted the F&B employees only one wage increase on September 1.

[4] The stipulation of facts also mentions employee performance reviews as a consideration. However, the Respondent admits in its answering brief that it has not considered employee performance reviews for the F&B employees as the basis for wage increases since January 2002. Moreover, the stipulation for amounts given to the F&B employees does not indicate any variation based on individual performance reviews since that time.

[5] All subsequent dates are in 2019, unless otherwise indicated.

[6] Non-F&B employees in some departments received a set monetary increase to their hourly rate, independent of the ratings received in their individual performance reviews. Non-F&B employees in other departments received a variable percentage increase to their hourly rate dependent on the ratings received in their performance reviews.

providing them with an increase (or decrease) would have been a unilateral change.

On October 18, the parties met for another bargaining session. The Union informed the Respondent that it believed the Respondent's failure to give a wage increase to the F&B employees was unlawful and that the Union would file an unfair labor practice charge if the Respondent refused to grant them an increase. The Respondent reiterated that it did not believe the law required it to grant a wage increase to the F&B employees and that it would not grant wage increases at that time.

B. The Parties' Contentions

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing, in September 2019, to adhere to a practice of giving annual wage increases to the F&B employees.

The General Counsel argues that the practice of giving the F&B employees an annual wage increase was an established term of employment. Consequently, the Respondent violated the Act by not giving the Union notice and an opportunity to bargain prior to changing that practice in 2019. The Respondent contends that wage increases were wholly discretionary and there was no discernable pattern to the timing, amount, or criteria for past wage increases. Therefore, it argues that maintaining the status quo wages for the F&B employees at 2018 levels was not a unilateral change in a term of employment over which it was required to bargain.

C. Discussion

It is well settled that an employer violates Section 8(a)(5) of the Act if it unilaterally changes a term or condition of employment for bargaining unit employees without giving their bargaining representative advance notice and an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "A wage increase program constitutes a term or condition of employment when it is an 'established practice . . . regularly expected by the employees.'" *Mission Foods*, 350 NLRB 336, 337 (2007) (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1236 (1994) (*Daily News II*), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997)) (ellipses in original). Further, "[i]t is the unilateral change in the terms and conditions of employment that results in the finding of an 8(a)(5) violation, not the type of wage increase that is continued or discontinued." *Daily News II*, supra at 1239. Indeed, the Board has found that an employer acts unlawfully in unilaterally discontinuing an annual wage increase program, regardless of whether the wage increase varies by individual employee based on merit, as in *Katz* and *Daily News II*,[7] or is a structural wage increase uniformly applied to categories of employees based on established economic criteria, as in the present case. See, e.g., *Mission Foods*, supra at 337; *Lee's Summit Hospital & Health Midwest*, 338 NLRB 841, 841 fn. 3 (2003).

Factors relevant to the determination of whether a wage increase is an established practice include "the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof." *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998). Here, contrary to the Respondent's assertions, the stipulated record shows that an annual wage increase for the F&B employees was a term and condition of employment, as it was "an established practice . . . regularly expected by the employees." *Mission Foods*, supra (quoting *Daily News II*, supra).

As to the factors of timing and regularity, we find that they are clearly met. The Respondent provided an annual wage increase to the F&B unit employees, effective September 1, in each of in the 5 years immediately preceding 2019. Board precedent supports finding a recurring pattern of such length to be sufficient to prove the existence of an established past practice. See, e.g., *Mission Foods*, supra at 337 (practice in effect for at least 4 years); *Lee's Summit Hospital*, supra at 841 fn. 3 (practice in effect for 4 years); *Daily News of Los Angeles*, 304 NLRB 511, 514 (1991) (*Daily News I*) (practice in effect for at least 3 years), remanded on other grounds 979 F.2d 1571 (D.C. Cir. 1992), supplemented by *Daily News II*. Moreover, prior to 2014, the Respondent gave the F&B employees a late September or October 1 wage increase in every year since 2002, other than 2009 in the aftermath of the Great Recession.[8] This amounts to 17 consecutive years, save one, that the Respondent granted the F&B employees a wage increase around the same time each year. After so many years, with such consistency and regularity in

[7] See also *Atlanticare Mgmt., LLC d/b/a Putnam Ridge Nursing Home*, 369 NLRB No. 28, slip op. at 1 (2020); *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 4 (2018), enfd. in relevant part 944 F.3d 294 (D.C. Cir. 2019).

[8] The Respondent's slight variation in timing between having granted wage increases for several years at the end of September or on October 1 and, more recently, on September 1 does not negate the Respondent's fixed timing of granting wage increases around the same time each year in September. See *Mission Foods*, supra at 337 ("[T]he timing of the [structural wage] increase was fixed, as the increases were consistently granted during the first *quarter* of each year.") (emphasis added). Moreover, although for several years the Respondent also granted a wage increase each spring, this in no way undercuts the F&B employees' reasonable expectation in September 2019 that they were due for a wage increase. After all, for the past 17 consecutive years, with one exception, the Respondent had granted the F&B employees a wage increase in September or on October 1.

timing, employees would reasonably come to expect to receive a wage increase around September.[9]

Further, as to the use of fixed criteria, the factors that the Respondent acknowledged using to determine the amount of its annual wage increases were objective considerations as to the propriety of a wage increase in a given year: the economic conditions in the hotel industry, specifically its own economic performance and the wages offered by its competitors, as well as any statutory minimum wage requirements.[10] The Board has recognized similar criteria, in particular the weighing of economic considerations, as sufficient to prove an established past practice. See, e.g., *Windsor Redding Care Center, LLC,* 366 NLRB No. 127, slip op. at 4 (2018) (finding past practice where employer relied on guidance from its parent corporation on the permissible range of merit raises, based on Medi-Cal and Medicare reimbursement rates, the profitability of the local facility, the economic and competitive environment of the local facility and the industry, the local wage index, competitive wages in the marketplace, and the local facility's budget), enfd. in pert. part 944 F.3d 294 (D.C. Cir. 2019); *Mission Foods*, supra at 336 (finding past practice where employer determined the amount of structural pay scale increase based on telephone survey to assess wage levels in the local market); *Waste Management de Puerto Rico*, 348 NLRB 565, 565 fn. 2, 568 (2006) (finding past practice where employer determined the amount of supplemental bonus "on the basis of the 'economic situation' and 'financial status of the moment'"); *Lee's Summit Hospital*, supra at 841 fn. 3 (finding past practice where employer based amount of annual general wage increases on a comparison of market wages and employer's profitability for the year).[11]

Even though the Respondent exercised discretion in applying its economic criteria, the Respondent still had an obligation to maintain the fixed elements of its practice, such as the timing of the wage increases, and bargain with the Union over the discretionary aspects, including the amount of the increase.[12] See *Windsor Redding Care Center, LLC*, supra, slip op. at 5 (finding employer obligated

[9] The Respondent primarily relies on three cases to argue that it did not have an established practice of granting wage increases to the F&B employees: *American Mirror*, 269 NLRB 1091 (1984), *News Journal Co.*, 331 NLRB 1331 (2000), and *St. George Warehouse, Inc.*, 349 NLRB 870 (2007). We agree with the General Counsel that each of those cases is distinguishable. In *American Mirror*, the Board affirmed a judge's decision that essentially found the employer's prior discretionary and across-the-board raises at different times from year to year without any consistency did not constitute a past practice. 269 NLRB at 1092 fn. 7, 1095 fn. 20. Further, as explained in *Windsor Reading Care Center*, 366 NLRB No. 127, slip op. at 4 fn.15, the Board in *News Journal* found, unlike the instant case, that there was no evidence that the employer had altered or discontinued its discretionary practice of granting merit increases. Finally, in *St. George Warehouse*, the judge found no past practice of merit wage increases in light of evidence that prior individual increases were neither regular nor automatic. 349 NLRB at 894. In this case, after 17 years—except one—of employees receiving a wage increase in September or on October 1, employees would reasonably understand the wage increases to be both regular and automatic.

[10] The parties' stipulation used the word "including" to list various economic considerations that the Respondent relied on in determining whether to grant an annual wage increase. Nonetheless, we have no reason to consider the list to be less than exhaustive. The parties could have said as much in the stipulation if it was not. If anything, the list of considerations is overinclusive, as it includes "employees' individual job performance reviews," even though, as noted above, the Respondent admits in its answering brief that it has not considered employee performance reviews for the F&B employees as the basis for wage increases since January 2002. In this context, the language in the stipulation that each of the factors considered by the Respondent was "more or less important (or, at times, not even considered at all), depending on the circumstances" is consistent with our finding that the Respondent relied on fixed criteria. For instance, the employees' individual job performance reviews were, according to the Respondent's answering brief, a factor that was never considered at all during the relevant time period. Similarly, the Respondent would have no need to consider statutory minimum wage requirements in years in which the statutory minimum wage did not change. Moreover, although the Respondent weighed its considerations differently each year, as would be logical with economic circumstances changing from year to year, the Respondent consistently relied on (some or all of) them as a set of factors from which to determine the viability of providing a wage increase in light of its economic performance and the local labor market. This is the same weighing of economic considerations that the Board has repeatedly found sufficient to constitute fixed criteria.

[11] These cases demonstrate that the dissent's characterization of the Respondent's economic considerations as not being fixed criteria is incorrect. The cases do not dictate, for example, that generalized indicia such as the profitability of a local facility, the competitive environment in an industry, "the economic situation," "the financial status at the moment," or the "comparison of market wages," be assessed in any particular way for economic considerations to be considered fixed criteria for the annual wage increases. Nor do these cases support the dissent's claim that the Respondent's reliance on economic considerations is tantamount to it having based its past annual wage increase decisions on virtually any criteria that the Respondent chose. Moreover, the economic considerations relied on by the Respondent are materially different from the circumstances in *Arc Bridges, Inc.*, in which the employer had essentially no criteria for determining whether to grant wage increases. 355 NLRB 1222, 1223–1224 (2010), enf. denied 662 F.3d 1235, 1238 (D.C. Cir. 2011) ("[T]here were no objective criteria for determining whether there would be any wage increase at all."). The *Arc Bridges* employer decided whether to grant an annual wage increase only "if sufficient funds existed" or "when financially feasible" without any evidence as to what factors, if any, it relied on in determining what constituted sufficient funds or financial feasibility. Id. Here, the Respondent specified in the stipulated record the economic considerations that it looked to in deciding whether and how much of a wage increase to grant the F&B employees each year.

[12] Because the Respondent exercised discretion in applying its economic criteria, the dissent claims that, had the Respondent granted the annual wage increase in 2019, it likely still would have had an 8(a)(5) charge filed against it. The suggestion that the Respondent was in a no-win position is without merit. In this instance, the violation, and the motive for the meritorious charge, was the Respondent's unilateral elimination of its longstanding practice of giving an annual wage increase to employees. Necessarily, a charge filed over the Respondent's continuation of this longstanding practice would have no merit. In any event,

to maintain fixed elements of merit wage program, specifically the timing of the wage increases); *Mission Foods*, supra at 337 (finding employer obligated to maintain fixed elements of structural wage increase and negotiate with the union over discretionary element); *Daily News II*, supra at 1236 (finding employer obligated to maintain annual merit increase "[n]otwithstanding the element of discretion retained by the [r]espondent in setting the amount of merit raises"); *Central Maine Morning Sentinel*, 295 NLRB 376, 376 (1989) (finding employer obligated to maintain annual wage increase even though the amount was discretionary).[13]

Having determined that the Respondent had a past practice of granting the F&B employees annual wage increases, we find that the Respondent failed to adhere to it. In this respect, we reject the Respondent's contention that a unilateral change violation cannot be found unless the General Counsel or Union can specify the amount of wage increase, if any, that the F&B employees should have received.[14] The violation alleged and found here is that the Respondent failed in 2019 to adhere to its longstanding practice of applying its established array of economic criteria to determine the amount of the wage increase it would award to the F&B employees that year and then grant it to them, effective September 1. Instead of continuing that practice, as the F&B employees would have reasonably expected the Respondent to do, in 2019, the Respondent considered none of its economic criteria and simply decided to unilaterally discontinue its longstanding practice of wage increases without so much as considering whether a wage increase was warranted under the usual application of its economic criteria.

In fact, the Respondent openly admitted that it had not considered the economic factors that it had relied on over the previous 17 years in deciding whether to grant a wage increase to the F&B employees in 2019. Rather, the Respondent informed the Union that it did not grant the F&B employees a wage increase in 2019 for one reason: the Act required it "to maintain the status quo while negotiating with the Union for a first contract," and it believed, mistakenly, that "the status quo with respect to wages is the employees' current wage rate." *That* rationale for denying employees their annual wage increases is far removed from the economic considerations long relied upon by the Respondent to determine the increases, considerations which resulted in the granting of raises for so many years and with such regularity that it rendered them an "established practice . . . regularly expected by the employees," and as such, a term and condition of employment for the unit employees.[15]

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there is no basis for any concern that the Respondent could not know its obligations. What the dissent misses is that the Respondent had an easy solution to avoid any risk of a (meritorious) 8(a)(5) charge—and that solution is one that the Act explicitly encourages. The Respondent could have satisfied its obligation under Sec. 8(a)(5), by merely providing the Union with notice and an opportunity to bargain over any changes to its practice of granting annual wage increases, including the discretionary aspects. But the Respondent admitted that it did not provide the Union with any advance notice of its decision to not grant the F&B employees a wage increase in 2019—nor did it offer to bargain over that decision.

[13] The dissent contends that we should explain how our decision squares with *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). First, Chairman McFerran notes that she adheres to her dissenting views in *Raytheon*, and Member Prouty notes that he has substantial doubt as to whether *Raytheon* was correctly decided. Both acknowledge that *Raytheon* is currently governing law. But more to the point, the Board's decision in *Raytheon* did not disturb the Board's longstanding precedent that an employer acts unlawfully by unilaterally discontinuing an annual wage increase program, even where the employer exercised substantial discretion in granting the wage increases. Indeed, the Board in *Raytheon* cited favorably *Mission Foods*, *Daily News II*, and *Central Maine Morning Sentinel*, the very cases we rely on here. Id., slip op. at 8.

[14] We note that the Respondent does not contend that it would not have given a wage increase of some amount to the F&B employees based on the same economic factors that had, with the exception of 2009, resulted in an increase of some amount every year since 2006. Also, the record shows a close correlation from 2015 to 2018 between annual increases for the F&B employees and those for other unrepresented hourly employees. The fact that those other unrepresented employees received increases in September 2019 strongly suggests that the F&B employees would have also received raises in some amount if the Respondent had continued its past practice. See *Lee's Summit Hospital*, 338 NLRB at 841 fn. 3 ("[W]e are not required to engage in any guesswork as to whether the [r]espondent would have exercised its discretion to grant a general wage adjustment in 2000, and if so, how much. This is because the [r]espondent, in fact, granted a 3-percent general wage increase in 2000 to the employees in all of the Health Midwest health care institutions, except of course the unit employees at Lee's Summit Hospital.").

[15] Indeed, the Respondent's stated rationale for denying the F&B employees their annual wage increase conveys to those employees that a harsh penalty is attached to their decision to choose union representation. *Covanta Energy Corp.*, 356 NLRB 706, 714 (2011) ("[T]he employer's announcement to employees that there would be no wage increase during negotiations (notwithstanding the history of providing annual wage increases) violated Section 8(a)(1) of the Act."); see also *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 114 (1997) (in the context of a practice of an annual wage increase "the statement that wages would be frozen until a contract is negotiated [is] an unlawful threat of loss of benefits and less favorable treatment if the Union were voted in"). The Respondent's announcement also falsely casts the newly elected Union, instead of the Respondent, as the party responsible for the F&B employees not receiving the annual wage increase that they had reasonably expected and by all evidence would have received had they not chosen union representation.

We find no independent violation in the Respondent's explanation—none was alleged or litigated—but note it because it underscores the inconsistency with the Act inherent in the Respondent's and the dissent's assertion that the attachment of a statutory duty to bargain required the Respondent to depart unilaterally from its established practice of granting annual wage increases regularly expected by employees. To the contrary, instead of an excuse *not* to bargain, the Union's certification as the statutory bargaining representative created an obligation for the Respondent to offer to bargain with the Union over any changes it wanted to make to its practice of an annual wage increase for the F&B employees.

In sum, we find that the Respondent implemented a unilateral change when it failed to adhere to its past practice of granting an annual wage increase to the F&B employees in September 2019. The Respondent did so without giving the Union advance notice and an opportunity to bargain. Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(5) and (1) of the Act by not granting wage increases to its newly represented food and beverage employees (except banquet servers and banquet supervisors) in September 2019 consistent with its past practice, without notifying the Union and giving it an opportunity to bargain over this change and its effects.
4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unilaterally changed terms and conditions of employment by failing to grant an annual wage increase to bargaining unit employees (except banquet servers and banquet supervisors) without giving the Union notice or the opportunity to bargain, we shall order the Respondent to make those bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful change in terms and conditions of employment.[16] Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate those bargaining unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar years for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall also order the Respondent to file, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.[17]

ORDER

The National Labor Relations Board orders that the Respondent, Omni Hotels Management Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying UNITE HERE Local 1 (the Union) and giving it the opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> *Included*: All regular part-time and full-time food and beverage employees, including stewards, cooks,

Relatedly, we also disagree with the dissent's claim that requiring employers to maintain the status quo, including the practice of annual wage increases, will "invite employers to err on the side of increasing wages unilaterally during collective bargaining, at the expense of union's bargaining leverage." As noted above, supra fn. 12, an employer unsure of its obligations need only do what the Act requires it to do: collectively bargain. Here, in the instant case, the damage to the Union's bargaining leverage, about which the dissent professes to be concerned, was in fact caused by the Respondent's unilateral elimination of its practice of giving annual wage increases to the F&B employees. The concern in the dissent's opposing hypothetical about employers giving away too much is simply not the issue before us.

[16] As part of the make-whole remedy, we anticipate that the wage increase that the F&B employees are owed for 2019 is similar to the annual wage increases other hourly employees received that year (see fn.14, infra). However, because the wage increase must be in accordance with the Respondent's past criteria for awarding annual wage increases to the F&B employees and its bargaining obligation to the Union, we leave the precise amount to be determined in compliance.

[17] In *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified by *Cascades Containerboard Packaging—Niagara*, 371 NLRB No. 25 (2021), we adopted this remedy and held that we would apply it in all pending and future cases involving backpay awards. Accordingly, we apply it here.

hosts/hostesses, servers, room service servers, food runners, banquet servers, banquet housepersons, bartenders, room service order takers, beverage servers, bussers, cafeteria attendants, steward supervisors, banquet supervisors, and room service supervisors employed by the Employer at 676 N. Michigan Avenue, Chicago, Illinois 60611.

Excluded: All other employees, including valet employees; engineering employees; housekeeping employees; front desk department employees; storeroom associates; and managers, guards, and supervisors as defined in the Act.

(b) Make affected bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral change in terms and conditions of employment, in the manner set forth in the remedy section of the decision.

(c) Compensate affected bargaining unit employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) File with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix" in English or any other foreign language deemed appropriate by the Regional Director.[18] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since September 1, 2019.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 20, 2022

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting.

My colleagues find that the Respondent violated Section 8(a)(5) of the Act by withholding a wage increase from newly represented food and beverage (F&B) employees at its Omni Chicago Hotel. They believe that to maintain the status quo of the unit employees' terms and conditions of employment, the Respondent had to increase their wages, and by failing to do so, it changed the status

[18] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

quo. And because the Respondent changed the status quo without giving the Union notice and opportunity to bargain, my colleagues find that it violated Section 8(a)(5).

I would find that ongoing wage increases were not a term and condition of employment for the F&B unit employees. To qualify as such, Board precedent and decisions of the United States Court of Appeals for the District of Columbia Circuit require that an employer's past practice of wage increases be fixed as to both timing and criteria. Even assuming my colleagues are correct that the Respondent's wage-increase practice was fixed as to timing, it was not fixed as to criteria. For this reason, the Respondent did exactly what the law required it to do when it held the wages of its F&B unit employees steady after those employees selected the Union as their bargaining representative. Accordingly, from my colleagues' contrary finding, I dissent.

Facts and Procedural Background

The relevant facts were stipulated and are therefore undisputed. On July 18, 2019, the Board certified UNITE HERE Local 1 (the Union) as the collective-bargaining representative of the Respondent's employees in the following bargaining unit:

> *Included*: All regular part-time and full-time food and beverage employees, including stewards, cooks, hosts/hostesses, servers, room service servers, food runners, banquet servers, banquet housepersons, bartenders, room service order takers, beverage servers, bussers, cafeteria attendants, steward supervisors, banquet supervisors, and room service supervisors employed by the Employer at 676 N. Michigan Avenue, Chicago, Illinois 60611.
>
> *Excluded*: All other employees, including valet employees; engineering employees; housekeeping employees; front desk department employees; storeroom associates; and managers, guards, and supervisors as defined in the Act.

In 2002 and from 2004 through 2013—with the exception of 2009—the Respondent increased the wages of F&B employees (other than banquet servers and banquet supervisors)[1] twice a year; from 2005 through 2013 (excluding 2009), it did so on or about April 1 and October 1 of each year. From 2014 through 2018, the Respondent increased the wages of F&B employees once a year, on September 1. The parties further stipulated that

> [b]etween January 2002 and June 2019, the decision of whether and when to grant Unit employees a wage increase and, if so, how much to grant them has been determined by Respondent based on various considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and the wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (or, at times, not even considered at all), depending on the circumstances.

The Respondent and the Union began negotiations for an initial collective-bargaining agreement in August 2019. The following month, the Respondent increased the wages of most of its hourly employees at the Omni Chicago Hotel, but employees in the newly represented F&B unit did not receive a wage increase. The Respondent did not give the Union advance notice that the F&B employees would not receive an increase.

In October 2019, representatives of the Union and the Respondent exchanged emails in which they disagreed over whether granting the F&B employees a wage increase the previous month would have maintained or changed the status quo. A few days later, the Union filed an unfair labor practice charge. The General Counsel issued complaint, and the Board granted the parties' joint motion to waive a hearing and submit the case to the Board for a decision based on a stipulated record. The sole issue presented for decision is whether the Respondent violated Section 8(a)(5) and (1) of the Act by not granting wage increases to its newly represented F&B employees in September 2019 without giving the Union advance notice.

Discussion

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that a unionized employer violates Section 8(a)(5) of the Act if, during negotiations for an initial collective-bargaining agreement, it changes the wages, hours, or other terms or conditions of employment of the unit employees without giving their collective-bargaining representative advance notice and opportunity to bargain over the change.[2] In *Katz*, the employer violated Section 8(a)(5) by increasing unit employees' wages. In *Daily*

[1] Banquet servers received no wage increase between October 2006 and September 2017; banquet supervisors received no wage increase between October 2007 and September 2017. The majority properly excludes banquet servers and banquet supervisors from its past-practice findings. I will do likewise; thus, references herein to the F&B unit employees exclude banquet servers and banquet supervisors.

[2] The Court subsequently held that the *Katz* doctrine also applies after a collective-bargaining agreement has expired "and negotiations on a new one have yet to be completed." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

News of Los Angeles,[3] the Board, applying *Katz* principles, found that the employer unilaterally changed the status quo in violation of Section 8(a)(5) by *failing* to increase unit employees' wages. In *Raytheon Network Centric Systems*, the Board "express[ed] no opinion on this reverse version of . . . *Katz*," but it cautioned that "considerable care" must be exercised when applying *Katz* in reverse. 365 NLRB No. 161, slip op. at 8 fn. 36 (2017). Importantly, *Daily News* and its progeny remain good law after *Raytheon*, but I approach my task in this case with the Board's cautionary note in mind.

The Board has consistently held that for an employer to have violated Section 8(a)(5) under *Katz* principles by freezing wages, the employer must have an established practice of adjusting wages that is fixed as to criteria as well as timing. See *Mission Foods*, 350 NLRB 336, 337 (2007) (whether an employer's wage-increase practice is an established term and condition of employment depends on "the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof") (internal quotation marks omitted); *Rural/Metro Medical Services*, 327 NLRB 49, 50 (1998) (holding that "[w]hen an employer has an established practice of granting wage increases according to fixed criteria at predictable intervals, a discontinuance of that practice constitutes a change in terms and conditions of employment . . . .").

Consistent with this standard, in each of the cases involving wage increases that my colleagues cite in support of their decision, the employer's wage-increase past practice was fixed as to both timing and criteria. See *Daily News II*, 315 NLRB at 1236 (finding established past practice where performance reviews were fixed as to timing—annually, on or about each employee's anniversary of hire—and wage increases were based on fixed criterion of merit); *Rural/Metro Medical Services*, supra (finding established past practice where employer granted increases annually, on or about each employee's anniversary of hire or promotion, based on fixed criterion of merit); *Lee's Summit Hospital & Health Midwest*, 338 NLRB 841, 841 fn. 3 (2003) (finding established past practice where wage increases were granted annually in early autumn based on fixed criteria of market wages and the employer's profitability); *Mission Foods*, supra (finding established past practice where employer granted wage increases annually in the first quarter of the year based on fixed criterion of a local wage survey); *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 4 (2018) (finding established past practice where employer granted wage increases annually on or about each employee's anniversary of hire based on fixed criterion of performance), enf. denied on other grounds 944 F.3d 294 (D.C. Cir. 2019);[4] *Atlanticare Management, LLC d/b/a Putnam Ridge Nursing Home*, 369 NLRB No. 28 (2020) (finding established past practice based on same fixed timing and criterion as in *Windsor Redding Care Center*).[5]

Applying this consistent line of precedent, I would find that the Respondent did not violate Section 8(a)(5) when it held wages steady in September 2019 for employees in the F&B unit. It did not violate Section 8(a)(5) because it did not have an established wage-increase practice that it was obligated to continue in order to maintain the status quo. And it did not have an established wage-increase practice because its past practice of annual wage increases was not fixed as to criteria. The parties stipulated that from 2002 to 2018, the Respondent has decided whether to grant an increase—and, if so, how much—"based on various considerations, including the budgeted, forecasted, and actual economic performance of the hotel, employees' individual job performance reviews, statutory minimum wage requirements, and the wage rates offered by comparable hotels in the Chicago area, with each of these considerations being more or less important (*or, at times, not even considered at all*), depending on the circumstances" (emphasis added).

The Respondent's past practice lacks fixed criteria in two respects. First, the criteria the Respondent has applied *include* the listed criteria, but this leaves open the possibility that other criteria also may have been applied. Second, and more importantly, the parties stipulated that "at times," particular criteria were "not even considered at all." Thus, the listed criteria comprise a non-exhaustive menu of considerations from which the Respondent selected in any given year, one or more of which were not considered at all in certain years. The majority cites no case, and I am aware of none, in which the Board has found wage increases to be an established term or

[3] 304 NLRB 511 (1991) (*Daily News I*), remanded 979 F.2d 1571 (D.C. Cir. 1992), reaffirmed 315 NLRB 1236 (1994) (*Daily News II*), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

[4] In *Windsor Redding Care Center*, the employer's parent company authorized its local facilities to increase wages each year within a permissible range. The parent company's range determination was based on a number of economic factors: "Medi-Cal and Medicare reimbursement rates, the profitability of the local facility, the economic and competitive environment of the local facility and the industry, the local wage index, competitive wages in the marketplace, and the local facility's budget." Id., slip op at 3–4. But within the permissible range of increases set by the respondent's corporate parent, the respondent based each employee's increase solely on performance.

[5] *Waste Management de Puerto Rico*, also cited by the majority, involved bonuses, not wage increases, but there as well, the employer's past practice was fixed as to both timing and criteria. See 348 NLRB 565, 568 (2006).

condition of employment based on past practice where, as here, the criteria applied to wage-increase decisions were not fixed.[6]

The majority reads the parties' stipulation as setting forth an exhaustive list of criteria, a questionable construction.[7] But even assuming their interpretation is correct in this regard, it simply cannot be that listing any number of discretionary factors yields criteria that are sufficiently fixed for purposes of determining the status quo requirements of a wage increase. "Fixed as to criteria" must mean something; the parties must be able to predict the particular verifiable basis upon which the employer's wage-increase decision will be made. When consistently applied from year to year, criteria such as job performance or employee merit, or competitive area wage rates, and even two factors in combination, have been found to constitute fixed criteria.[8] But listing nearly every conceivable criterion that an employer generally might consider in deciding whether to grant a wage increase simply cannot constitute the necessary fixed criteria. Here, the parties' stipulation does just that: it lists nearly every conceivable factor any employer might consider in deciding whether to grant a wage increase, from actual and forecasted economic performance to employees' job performance to area wage rates. And worse, the stipulation says that each of the listed criteria may *or may not* be considered by the Respondent in any given year, depending on the circumstances. This is simply another way of saying that the employer can grant increases based on virtually any criteria it chooses.[9] By finding that multiple factors that may or may not be considered by an employer constitute fixed criteria, the majority stretches the Board's status quo precedent well beyond its limits. In doing so, they invite employers to err on the side of increasing wages unilaterally during collective bargaining, at the expense of unions' bargaining leverage.

The majority also does not explain how their finding squares with *Raytheon Network Centric Systems*, supra. In *Raytheon*, the Board announced a standard for determining whether an employer changed the status quo and thereby incurred a duty to bargain on request before doing so. Nevertheless, my colleagues find that the Respondent changed the status quo without coming to terms with that standard. This leaves their analysis incomplete and, to that extent, inadequate.[10]

Finding no past practice here is consistent with *Raytheon*. In *Raytheon*, the Board said that an employer does not change the status quo by taking action "similar in kind

[6] Although the lack of fixed criteria alone is sufficient to warrant dismissal of the General Counsel's complaint, there is also reason to question whether the Respondent's wage increases were fixed as to timing. The majority primarily relies on 4 years' data (2015–2018), whereas the stipulation of facts sets forth the Respondent's history of wage increases over the course of 17 years. In *Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235 (D.C. Cir. 2011), the court reminded the Board that "[t]he Act requires the Board to base its factual findings 'on the record considered as a whole,'" id. at 1239, and it faulted the Board for considering only the employer's most recent wage-increase history where the record contained evidence going back further in time. Here, in most of the earlier 13 years, F&B employees received an increase in the fall, as the majority points out. But in 10 of those 13 years, F&B employees received two increases per year. My colleagues rely on those 10 years as supporting the consistency of the fall increases, describing the second springtime increase as an "additional" one. However, the fact remains that in those years, the Respondent granted wage increases at two different times during the year. This is not the same as one increase per year. From this perspective, it is difficult to see how the Respondent's wage increases were fixed as to timing.

[7] Reading the word "including" out of the stipulation, my colleagues declare the stipulated nonexhaustive criteria to be exhaustive. The parties chose the wording of their stipulation, and I take them at their word.

[8] See *Lee's Summit Hospital & Health Midwest*, supra, where wage-increase decisions were based on two criteria, market wages and the employer's profitability. Notably, in every other case the majority cites where the Board found that maintaining the status quo required a wage increase, the employer based its decision on just one criterion, typically merit.

[9] The majority says that while the Respondent "exercised discretion . . . in determining which [criteria] to rely upon," its duty was to maintain "the fixed elements of its practice, such as the timing of the wage increases, and bargain with the Union over the discretionary aspects." This begs the question of whether the Respondent had a dynamic status quo wage-increase practice in the first place. The duty my colleagues describe arises if and only if it did. As explained above, it did not, precisely because, as my colleagues acknowledge, it exercised discretion in determining which criteria to rely on. To my mind, that is simply another way of saying it lacked fixed criteria.

The majority faults the Respondent for telling the Union that it was holding wages steady due to the latter's advent as the unit employees' bargaining representative. Indeed, my colleagues come close to saying that had this statement been alleged as an unfair labor practice, they would have found a violation. But surely, the Respondent was justified in saying as much. It was reasonable for the Respondent to conclude that, given the variability in criteria it applies from year to year in making wage-increase decisions for its F&B employees, its duty under the law was to withhold the increase in 2019 rather than to give it. Had it made the opposite choice, odds are it still would have found itself on the receiving end of an 8(a)(5) charge. My colleagues say it had a third choice—to give the Union notice and opportunity to bargain—but this choice assumes the very duty the existence of which is at issue here. The Respondent had no duty to bargain, so it was entitled to act—or, in this reverse *Katz* case, to refrain from acting—unilaterally.

[10] The General Counsel has signaled her interest in revisiting *Raytheon*. See "Mandatory Submissions to Advice," Memorandum GC 21-04 (Aug. 12, 2021), at 5. The majority apparently shares that interest. That being the case, I would suggest their finding here that ongoing annual wage increases constitute the dynamic status quo based on past practice, despite the Respondent's wide discretion in selecting the criteria to apply from year to year, may prove difficult to reconcile with a return to pre-*Raytheon* precedent. See *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 7 (2016) (citing favorably cases in which "the Board has narrowly interpreted when a past practice was sufficiently fixed as to timing and criteria—thereby limiting employer discretion—as to deem further changes to be a permissible continuation of the dynamic status quo").

and degree to what the employer did in the past." 365 NLRB No. 161, slip op. at 13. The Board derived this standard from *Shell Oil Co.*, 149 NLRB 283 (1964), and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965), where the issue was whether the employer changed the status quo by letting certain subcontracts. In each case, the Board found it did not, reasoning that the challenged subcontracting did not materially vary in kind or degree from what had been customary in the past. *Shell Oil*, 149 NLRB at 288; *Westinghouse*, 150 NLRB at 1576.

Although the Board in *Raytheon* expressed no opinion on the "reverse version" of *Katz*, it did not overrule *Daily News* and its progeny. To the contrary, *Raytheon* cited both *Daily News II* and *Mission Foods* as extant precedent. See 365 NLRB No. 161, slip op. at 8. And *Mission Foods*, as we have seen, expressly requires "fixed criteria" to find ongoing wage increases to constitute a term or condition of employment. 350 NLRB at 337. To harmonize *Raytheon* with the *Daily News* line of cases, then, *Raytheon* must be construed as holding that wage increases are not "similar in kind" unless they are based on the same criteria. Thus, wage increases based on the cost-of-living index are not similar in kind to wage increases based on performance, or profits, or a market analysis of competitors' wages. Turning to the present case, because the Respondent's wage increases over the years were not fixed as to criteria, its increases in some years were not similar in kind to increases in other years. Accordingly, the Respondent was not obligated to grant its F&B unit employees a wage increase in 2019 in order to maintain the status quo under either *Raytheon* or the *Daily News* line of cases.

Finally, requiring a past practice of wage increases to be fixed as to both timing and criteria in order to establish a term or condition of employment is necessary to make the Board's decision in this case enforceable in the D.C. Circuit. In its decision on review of *Daily News II*, the court wrote:

> The NLRB's supplemental decision (and the prior decision of this court) focused solely on the fact that the merit-increase program was fixed as to timing. While we find that the regularized, annual nature of the evaluations at issue is relevant to whether employees had come to view the merit increases as fixed terms or conditions of employment, see, e.g*., Guy Gannett Publishing Co.,* 295 N.L.R.B. 376, 378, 1989 WL 224140 (1989) (Because an annual wage-increase policy had been granted for many years, "the work force surely was entitled to regard it as a permanent element in their wage structure program."), we do not believe that fixed timing alone would be sufficient to bring the program under *Katz*. In this case, had the Board found that the Company retained total discretion to grant the increases based on any factors it chose, we doubt that discontinuing the policy would have resulted in a violation of section 8(a)(5) even though the raises had been awarded annually.

Daily News of Los Angeles v. NLRB, 73 F.3d 406, 412 fn. 3 (D.C. Cir. 1996). Strictly speaking, the court's expression of "doubt" that a wage-increase program fixed as to timing alone would suffice to "bring the program under *Katz*" could be construed as dicta rather than holding—but that is not how the D.C. Circuit itself views it. See *Arc Bridges v. NLRB*, 662 F.3d at 1239 ("The only common theme linking Arc Bridges' wage increases is timing—a characteristic found insufficient to create a term or condition of employment in *Daily News*" (citing 73 F.3d at 412 fn. 3).).

For all the foregoing reasons, I would find wage increases were not an established employment term for the Respondent's F&B unit employees. The stipulation of facts compels a finding that the Respondent's wage-increase practice was not fixed as to criteria. Without being constrained by fixed criteria, a past practice of wage increases does not create an established term or condition of employment under the *Daily News* line of cases, *Raytheon*, or relevant D.C. Circuit precedent. Therefore, the Respondent was not obligated to give the Union notice and opportunity to bargain before it held wages steady for its F&B unit employees in 2019, and it did not violate Section 8(a)(5) by not doing so. Accordingly, I respectfully dissent.

Dated, Washington, D.C. January 20, 2022

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John F. Ring, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying UNITE HERE Local 1 (the Union) and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Included: All regular part-time and full-time food and beverage employees, including stewards, cooks, hosts/hostesses, servers, room service servers, food runners, banquet servers, banquet housepersons, bartenders, room service order takers, beverage servers, bussers, cafeteria attendants, steward supervisors, banquet supervisors, and room service supervisors employed by the Employer at 676 N. Michigan Avenue, Chicago, Illinois 60611.

Excluded: All other employees, including valet employees; engineering employees; housekeeping employees; front desk department employees; storeroom associates; and managers, guards, and supervisors as defined in the Act.

WE WILL make our affected employees whole for any loss of earnings and other benefits suffered as a result of our unlawful change to their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain, plus interest.

WE WILL compensate our affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 13, within 21 days of the date of the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

OMNI HOTELS MANAGEMENT CORPORATION

The Board's decision can be found at https://www.nlrb.gov/case/13-CA-250528 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.